Platinum Heights Sdn Bhd v Sun Mix Concrete Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5-24-407-1995
KAMALANATHAN RATNAM JC
8 MARCH 1996

Civil Procedure *— Injunction to restrain winding-up petition — Ambiguous admission of debt — Contract to supply goods between debtor and creditor — Whether non-receipt of final account from third party would justify non-payment of debt — Withholding material facts by debtor — Whether application for injunction should be dismissed*

Civil Procedure *— Originating summons — No cause of action or substantive issue — Non-compliance with O 7 r 3(1) of the Rules of the High Court 1980 — Whether summons should be rejected — Rules of the High Court 1980 O 7 r 3(1) & O 92 r 3*

The plaintiff was awarded by Mivan Far East Sdn Bhd ('the main contractor') a contract for structural concrete works for a condominium project. The defendant agreed to supply concrete to the plaintiff for the project. The plaintiff had at various times disputed the quality, quantity and prices of the concrete supplied by the defendant. However, after several variations and adjustments, the plaintiff vide exh E-6 adjusted the sum and admitted owing to the defendant as at 31 July 1995 a sum of RM819,233.50. When the plaintiff failed to settle the debt, the defendant commenced winding-up proceedings against the plaintiff with the issue of a s 218 (of the Companies Act 1965) statutory notice of demand for the sum RM699,114.50 owed by the plaintiff after deducting the part of the sums received directly from the main contractor. The plaintiff denied owing the said sum and referred to the intended winding-up proceedings as a threat against it. The plaintiff argued that the defendant had no right to make any claims against it as the main contractor had not paid the plaintiff pending the final account agreement between the main contractor and the plaintiff. Thus, an originating summons was filed by the plaintiff seeking an order to prevent the defendant from filing and/or proceeding with a winding-up petition against the plaintiff until further order. In support of his application, the plaintiff submitted that: (i) his application was for an injunction to restrain the defendant from presenting a winding-up petition against the plaintiff; (ii) there was a 'writ action' pending in court in respect of the debt and the defendant had not obtained any judgment; and (iii) the debt was also in dispute.

Held, dismissing the plaintiff's originating summons with costs:

(1) There was a debt due and the defendant was at liberty to proceed to issue a winding-up petition against the plaintiff. There was no dispute as to the debt since although there were complaints raised by the plaintiff in respect to the quality and quantity of the concrete supplied, the final sum was eventually agreed upon by

the plaintiff itself and the plaintiff had made a clear and unambiguous admission vide exh E-6 that the sum of RM819,233.50 was owed to the defendant as at 31 July 1995. The plaintiff could not rely on the fact that the defendant had received payment from the main contractor and that they had not as yet received the final account from the main contractor to deny the defendant's claim as the contract was purely and directly between the plaintiff and the defendant. Further, in the present case, the plaintiff had not been forthright in submitting that there was already a writ action filed when clearly that was not true. Also, there was clearly a material non-disclosure on the part of the plaintiff when it withheld disclosure of exh E-6, which was its own written admission that it owed the defendant the sum of RM819,233.50. Hence, the originating summons was dismissed with costs (see pp 416F, C–E and 417G–H).

(2) The contents of the originating summons filed by the plaintiff did not disclose a cause of action as required by O 7 r 3(1) of the Rules of the High Court 1980 ('the RHC'). Had the court granted the injunction, the injunction would have been to preserve the status quo of the parties pending the determination of the substantive issue. However, there was no substantive issue and/or cause of action for the court's determination. It would have been a proper case for action to be taken pursuant to O 92 r 3 of the RHC to reject the originating summons filed by the plaintiff (see p 417D–F).

[Bahasa Malaysia summary

Plaintif diberikan suatu kontrak untuk kerja struktur konkrit bagi sebuah projek kondominium oleh Mivan Far East Sdn Bhd ('kontraktor utama'). Defendan bersetuju membekalkan konkrit kepada plaintif untuk projek tersebut. Plaintif pernah beberapa kali mempertikaikan mutu, jumlah dan harga konkrit yang dibekalkan oleh defendan. Walau bagaimanapun, selepas pelbagai ubahan dan pelarasan, menerusi eks E-6 plaintif menyelaraskan jumlah dan mengaku berhutang jumlah sebanyak RM819,233.50 pada 31 Julai 1995 kepada defendan. Apabila plaintif gagal menjelaskan hutang, defendan memulakan prosiding penggulungan terhadap plaintif dengan mengeluarkan suatu notis tuntutan statutori di bawah s 218 (Akta Syarikat 1965) untuk jumlah RM699,114.50 yang terhutang oleh plaintif selepas menolak bahagian jumlah yang diterima terus daripada kontraktor utama. Plaintif menafikan beliau terhutang jumlah yang dikatakan dan merujuk kepada prosiding penggulungan yang dirancang sebagai suatu ancaman terhadapnya. Plaintif berhujah bahawa defendan tidak berhak untuk membuat apa-apa tuntutan terhadapnya kerana kontraktor utama belum pun membayar plaintif sementara menunggu perjanjian akaun muktamad antara kontraktor utama dan plaintif. Justeru itu, suatu saman pemula difailkan oleh plaintif yang memohon perintah bagi menghalang defendan daripada memfailkan dan/atau meneruskan tindakan dengan suatu petisyen

penggulungan terhadap plaintif sehingga perintah lanjut. Sebagai menyokong permohonannya, plaintif menghujahkan bahawa: (i) permohonannya adalah untuk suatu injunksi bagi menahan defendan daripada mengemukakan petisyen penggulungan terhadap plaintif; (ii) terdapat suatu 'tindakan writ' yang menunggu penyelesaian di mahkamah berkenaan dengan hutang itu dan defendan belum lagi memperolehi apa-apa penghakiman; dan (iii) hutang itu juga dipertikaikan.

Diputuskan, menolak saman pemula plaintif dengan kos:

(1) Terdapatnya hutang yang harus dibayar dan defendan bebas untuk terus mengeluarkan petisyen penggulungan terhadap plaintif. Tiada pertikaian berhubung dengan hutang itu sebab walaupun plaintif telah membangkitkan aduan berkenaan dengan mutu dan jumlah konkrit yang dibekalkan, jumlah muktamad akhirnya disetujui oleh plaintif sendiri dan plaintif telah membuat suatu pengakuan yang jelas melalui eks E-6 bahawa jumlah RM819,233.50 dihutang kepada defendan pada 31 Julai 1995. Plaintif tidak boleh bergantung kepada fakta bahawa defendan telah menerima bayaran daripada kontraktor utama dan bahawa pada masa itu mereka belum lagi menerima akaun muktamad daripada kontraktor utama bagi menafikan tuntutan defendan kerana kontrak adalah semata-mata dan secara langsung antara plaintif dan defendan. Selanjutnya, dalam kes ini, plaintif tidak bersikap terus-terang dalam hujah bahawa sudah pun terdapat suatu tindakan writ yang difailkan apabila ianya jelas tidak benar. Tambahan pula, nyata terdapat ketakdedahan yang material pada pihak plaintif apabila ia enggan mendedahkan eks E-6, yang merupakan pengakuan bertulis sendiri bahawa ia berhutang jumlah sebanyak RM819,233.50 dengan defendan. Oleh itu, saman pemula ditolak dengan kos (lihat ms 416F, C–E dan 417G–H).

(2) Kandungan saman pemula yang difailkan oleh plaintif tidak mendedahkan suatu kausa tindakan seperti yang dikehendaki oleh A 7 k 3(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Jika mahkamah memberikan injunksi pun, injunksi itu adalah bertujuan mengekalkan status quo pihak-pihak sementara menunggu penentuan isu substantif. Walau bagaimanapun, tiada sebarang isu substantif dan/atau kausa tindakan untuk penentuan oleh mahkamah. Ini merupakan suatu kes yang wajar di mana tindakan patut diambil menurut A 92 k 3 KMT untuk menolak saman pemula yang difailkan oleh plaintif (lihat ms 417D–F).]

Notes

For cases on injunctions to restrain winding-up petitions, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1506–1507.

For cases on winding-up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

For cases on originating summons, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2334–2351.

Legislation referred to

Companies Act 1965 s 218
Rules of the High Court 1980 O 7 r 2(2), O 7 r 3(1), O 92 r 3

Saran Singh (*Saran Singh & Co*) for the plaintiff.
M Ravichandar (*Lachaman Lalchand & Associates*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam JC: This was an originating summons filed by the plaintiff seeking an order to prevent the defendant from filing and/or proceeding with a winding-up petition against the plaintiff until further order and for damages to be assessed and for costs.

Background facts

In support of the originating summons, one Tan Teik Lye, a director of the plaintiff, affirmed an affidavit on 30 November 1995 ('the affidavit in support'). He exhibited thereto a letter from the defendant dated 22 November 1995 which was a s 218 statutory notice of demand for the sum of RM699,114.50 being the price of concrete sold and delivered by the defendant to the plaintiff and further legal costs of RM150. The plaintiff denied owing the said sum and referred to the intended winding-up proceedings as a threat against it. He further contended that in the event that the defendant was not so restrained, the plaintiff's business would be closed down and about 50 employees would be without job. He also disputed the debt as claimed by the defendant and stated that there were discrepancies in the volume of concrete received. He further stated that the defendant's claim was premature as final accounts had not been prepared.

The facts leading to this originating process was that on 22 March 1994, the plaintiff received a letter of award from Mivan Far East Sdn Bhd ('the main contractor') awarding to it the contract for structural concrete works for the Mount Kiara Pelangi Condominium Project at a provisional sum of RM10m. The letter of award stated that the contract was to commence on 23 March 1994 and the completion date was June 1995 and that payment would be made on a twice monthly basis. The defendant had agreed with the plaintiff to supply the concrete to the project site. The plaintiff had at various times disputed the quality, quantity and prices of the concrete supplied by the defendant. A perusal of exh T-4 dated 4 November 1994 showed that it was a letter written by the plaintiff to the main contractor referring to an alleged increase in price. However, far from being a protest, the letter informed the main contractor that if there was an increase in the price by the defendant, which had purportedly been agreed upon by the developer, then consequentially the plaintiff would have to adjust its concrete rate with the main contractor as well. To support the allegation that the defendant had not sent the proper volume of concrete, the plaintiff produced exh T-5 which was a letter from the

main contractor to the plaintiff dated 21 March 1995 whereby the main contractor noted that the concrete delivery dockets from the defendant indicated a substantial difference in the volume of concrete required for a typical floor on Blocks A and B where the same formwork was being used and that letter requested the plaintiff to contact the defendant to identify 'where this discrepancy arises'. There was therefore no direct blame put on the defendant. The plaintiff also contended that vide exh T-6 the main contractor had disputed the amount. However, a perusal of exh T-6 clearly shows that far from disputing the amount, the main contractor had indicated that it was pursuing the agreement of 'all outstanding variations' with the developer. It was then further contended in the affidavit in support that after that, all parties had agreed that the defendant could claim for payment for the concrete from the main contractor and/or the developer and that the letter exh T-7 was self-explanatory. However, exh T-7 is a letter from the developer to the plaintiff confirming that it had agreed to authorize the main contractor to make payments directly to the defendant from the balance of money due from the main contractor to the plaintiff. Moneys were then paid directly from the main contractor to the defendant as evidenced by the three letters exhibited as exh T-8 dated 14 November 1995, 21 September 1995 and 18 August 1995 whereby the sums of RM96,130, RM23,989 and RM51,237 respectively were paid directly to the defendant based on the plaintiff's progress payment claim for that period in respect of 'their outstanding balance' to the defendant.

The plaintiff then annexed two further letters marked as 'T-9' dated 26 July 1995 and 24 November 1995 to its affidavit in support. The letter dated 26 July 1995 was from the main contractor to the defendant registering its surprise that the plaintiff had an overdue account with the defendant and that it would have been better had it been informed at the beginning of the slippage and that it would use its best endeavours to try to get the plaintiff to regularize its account with the defendant. The letter dated 24 November 1995 was also from the main contractor addressed to the plaintiff and copied to the defendant. The letter confirmed that the main contractor would only make the final payment to the plaintiff after the final account agreement between the main contractor and the developer and the final account agreement between the main contractor and the plaintiff had been reached. As such, the plaintiff was of the view that the defendant had no right to make any claims against it or to demand payment before the finalization of the final account agreements.

In reply, the defendant's credit control manager affirmed an affidavit on its behalf. He averred that since the plaintiff had refused to pay the sum due, as admitted by it, the defendant intended to proceed with the winding up proceeding without the need to obtain a judgment. He further contended that all the allegations regarding quality and quantity were baseless as these matters had been regularized. The defendant vide exh E-5 had claimed for a sum of RM829,019.50. However, after variations and adjustments were made, the plaintiff vide exh E-6 dated 30 August 1995 adjusted the sum owing to the defendant and admitted owing to the defendant as at 31 July 1995 a sum of RM819,233.50 made up as follows:

Feb 1995 account	—	RM167,337.50
Mar 1995 account	—	RM217,054.00
Apr 1995 account	—	RM219,440.00
May 1995 account	—	RM104,924.00
June 1995 account	—	RM 71,668.00
July 1995 account	—	RM 38,810.00
TOTAL		RM819,233.50

These figures were arrived at based on the terms and conditions and rates stipulated by the defendant in its quotation dated 13 June 1994 (exh E-1) which terms and conditions and rates had been agreed upon by the plaintiff.

In response to E-6 above, the defendant replied vide its letter dated 25 October 1995 (exh E-7) as follows:

Our Ref: DB/SMC, P/73-466
Date: 25 October 1995

Platinum Heights Sdn Bhd
No 23, Scott Road,
10350 Penang.
(Attn: Mr Tan Teik Lye)

Dear Sirs,

Re: Accounts (principal debts of RM795,244.50)

Feb 1995 account	—	RM143,348.50 (Balance)
Mar 1995 account	—	RM217,054.00
Apr 1995 account	—	RM219,440.00
May 1995 account	—	RM104,924.00
June 1995 account	—	RM 71,668.00
July 1995 account	—	RM 38,810.00

Further to your letter dated 30 August 1995, please be advised that we have recently received a cheque of RM23,989 (TPBB cheque # 486301) being direct payment from Mivan Far East Sdn Bhd to settle part of your February 1995 outstanding debts with us.

The total outstanding amount as at 31 July 1995 (after deducting the above payment of RM23,989) is per the breakdown shown above.

We also regret to advise that we have so far received minimum payments (ie RM51,237 in August 1995 and RM23,989 on 25 September 1995) only from Mivan Far East Sdn Bhd to settle part of your outstanding debts with us. The accounts have turned very old and we require your immediate payment to regularize them accordingly.

Thanks for your urgent attention on this matter.

Yours faithfully
SUN-MIX CONCRETE SDN BHD

Sgd
ER TIAN GIN
Credit Control Manager

cc: (1) Mivan Far East Sdn Bhd — Mr Lim Laughlin
(2) Mr CC Pan — Sunrise Bhd

In response to the contention that the defendant had agreed to make its claim directly from the main contractor, the defendant denied this and instead referred to the plaintiff's exh T-7 and also exh E-4 whereby it was clear that far from the defendant having agreed to making a claim directly from the main contractor, it was the plaintiff who had agreed to authorize the main contractor to make payment directly to the defendant from the balance money due from the main contractor to the plaintiff. The defendant stated that though it had received payments directly from the main contractor, it did not make any agreement with any party to claim the balance of its claims against the main contractor or to absolve the plaintiff of its responsibility to pay the balance outstanding. Exhibits E-2, 5 and 7 are the various demands made to the plaintiff for the long overdue accounts.

The defendant thus contended that based on the plaintiff's own admission vide exh E-6 that the balance outstanding as at 31 July 1995 was RM819,233.50 after deducting the sums of RM23,989 paid on 25 September 1995 (exh E-7) and RM96,130 on 14 November 1996 (exh T-8) being sums received directly from the main contractor, there was a balance sum of RM699,114 outstanding. This was the exact sum stated in the statutory notice of demand.

The plaintiff filed a further affidavit in reply dated 4 January 1996 whereby the same Tan Teik Lye denied admitting owing the sum of RM819,233.50 as stated in exh E-5. He contended that the main contractor had questioned the quality and quantity of the concrete and would only pay for actual quantities based on the project drawings. He further alleged that up to the date of filing the affidavit, he had not received the final account from the main contractor.

With regard to exh E-6, ie the letter dated 30 August 1995 in which he admitted owing RM819,233.50, he contended that the said calculations did not take into consideration variations and adjustments, but was based on the delivery dockets of the defendant. The rest of his affidavit contained repetitions of the averments of his earlier affidavit in support.

Whether there was a debt due

In his written submission, counsel for the plaintiff submitted that his application was for an injunction to restrain the defendant from presenting a winding-up petition against the plaintiff. He submitted that there was a 'writ action' pending in court in respect of the debt and that there was no judgment obtained by the defendant. The debt he contended was also in dispute. As facts would later disclose and as submitted by the defendant and without any further rebuttal submission by the plaintiff, this allegation that there was a 'writ action pending in court in respect of the debt', was a totally misleading statement. There was indeed no such writ or suit filed. If this was an inadvertent error in submission, then when such a challenge was taken up by the defendant, the plaintiff ought to have written a letter at least conceding to this fact. However, inspite of the court having given the plaintiff time to file a reply to the defendant's submission, none was forthcoming. In his submission, the plaintiff contended that since the main contractor had not paid the plaintiff for the concrete, the plaintiff was therefore unable to pay the debt. Counsel relied on the arrangements for payment to be made directly by the main contractor to the defendant and

submitted that therefore the defendant ought not to go against the plaintiff. He also relied on the various complaints made by the main contractor regarding the quality and quantity of the concrete supplied. There was a further reliance on the alleged price increase and he submitted that these are issues which ought to be tried in a 'writ action'.

The defendant in its reply pointed out that there was no writ or any proceedings in any court in respect of this matter except for the present proceedings. It was the defendant's contention that the contract here was between the plaintiff and the defendant and did not involve the main contractor. There was also no dispute as to the debt since the plaintiff had admitted by way of exh E-6 to owing the sum of RM819,233.50 as at 31 July 1995 and this was the outstanding sum owing to the defendant after deducting all the disputed amounts. It was submitted that the plaintiff is now trying to give a different interpretation to exh E-6 by stating that the admission was based on the delivery dockets.

I find as a fact that based on the letters exhibited, the plaintiff was unable to pay its debts. I also find as a fact that there were complaints raised regarding the quality and quantity of the concrete supplied but that a final sum was eventually agreed upon by the plaintiff's exh E-6. I find it well established that the plaintiff had made a clear and unambiguous admission by way of exh E-6 and that the plaintiff owed the defendant the sum of RM819,233.50 as at 31 July 1995.

The submission by the plaintiff that since he had not received any money from the main contractor, he is unable to pay the defendant, is totally untenable as the contract was purely and directly between the plaintiff and the defendant. The further contention that since he had not as yet received the final account from the main contractor again is of no consequence to the defendant. If the main contractor had not paid him, then he ought to proceed to recover his just dues. I hold that there is a debt due and that the defendant is at liberty to proceed to issue a winding-up petition against the plaintiff. The plaintiff of course will have recourse to petition in whichever way it deems it fit.

Procedure

Some points on the cause papers filed in this case:

(a) Description of parties

The originating summons filed by the plaintiff described the parties as 'applicant' and 'respondent' but it was quite clear from O 7 r 2(2) of the Rules of High Court 1980 ('the RHC') that:

> The party taking out an originating summons (other than an *ex parte* summons) shall be described as a plaintiff and the other parties shall be described as defendants.

I had therefore pursuant to this rule altered the description of the parties.

(b) Contents of the originating summons

Order 7 r 3(1) of the RHC states as follows:

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> 3(1) Every originating summons must include a statement of the questions on which the plaintiff seeks the determination or direction of the High Court or, as the case may be, a concise statement of the relief or remedy claimed in the proceedings begun by the originating summons with sufficient particulars to identify the cause or causes of action in respect of which the plaintiff claims that relief or remedy.

B However, this originating summons filed by the plaintiff did not contain any such statement of questions for the court's determination or direction nor was there a concise statement of the relief or remedy claimed and neither was there a statement with sufficient particulars to identify the cause or causes of action in respect of which it wishes to claim that relief C or remedy, but merely contained the prayers it wished for as follows:

(a) Penentang dilarang memfailkan dan/atau meneruskan petisyen penggulungan terhadap pemohon hingga perintah lanjutan.

(b) Ganti rugi ditaksir oleh penolong kanan pendaftar.

(c) Kos dalam kausa.

D (d) Apa-apa relief lain yang dianggap munasabah oleh mahkamah.

The above originating summons does not disclose a cause of action. There is no substantive issue for the court's determination. Had the court granted the injunction, the injunction would have been to preserve the status quo of the parties pending the determination of the substantive issue or cause E of action. If indeed the debt is being disputed on substantial grounds, some effort ought to be made to state it in more detail with sufficient particulars. As it stood, there appears to be no substantive cause of action. Apart from the injunction, what other order could this court make bearing in mind that the relief prayed for is an injunction to prevent the defendant F from filing a winding-up proceeding until further order.

In my view, this would have been a proper case for action to be taken pursuant to O 92 r 3 of the RHC which states:

> 3 The Registrar, or any officer charged with the duty of receiving and filing any document, may reject it if it does not substantially comply with these rules.

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In conclusion, since the relief sought is an injunctive relief, I am constrained to hold that the plaintiff has not been forthright in submitting that there was already a writ action filed when clearly this was not true. I further hold that there was clearly a material non-disclosure on the part of the plaintiff H when it withheld disclosure of exh E-6, that is its own written admission that it owed the defendant the sum of RM819,233.50. Hence, I had no hesitation in dismissing this originating summons with costs.

Application dismissed.

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Reported by Rudeen Chua